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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS GAONA, Defendant and Appellant.	B289333 (Los Angeles County Super. Ct. No. BA347261)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Elliott Veals, Judge. Reversed with directions.

Gloria Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Chung L. Mar, and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Nicholas Gaona appeals his 42-year sentence on eight counts of cocaine transportation and distribution. This sentence consists of 35 years in enhancements based on the weight of the cocaine attributable to each count, which in one instance exceeded 170 kilograms. Gaona's first argument on appeal relies on the Criminal Justice Realignment Act of 2011 (the Act or Realignment Act). The Act requires that defendants convicted of certain non-violent felonies be incarcerated in jail, rather than in state prison. The Act also creates a presumption that courts will not impose straight jail term sentences for such offenses, but rather "split sentences"—that is, sentences comprised in part of jail time and in part of mandatory supervision—unless the court expressly finds that mandatory supervision would not be in the interest of justice. Gaona argues that the court was unaware of the provisions of the Act and implementing rules applicable to his convictions, and thus could not have exercised informed discretion thereunder in sentencing Gaona. We agree. Accordingly, we reverse and remand for resentencing consistent with the Realignment Act.

We further conclude that, because a "significant period of time" has passed since Gaona's original sentencing in March 2012, California Rules of Court, rule 4.411(a)(2)[1] requires the trial court request and consider a supplemental presentence report upon remand and resentencing.

Because our decision on Gaona's Realignment Act arguments vacates his 42-year sentence, Gaona's constitutional challenge to that sentence as cruel and unusual punishment is moot, and we do not address it.

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1 All further rule references are to the California Rules of Court.

Finally, Gaona argues that the abstract of judgment reflects an inaccurate description of credits awarded him for time served and incorrectly imposes criminal lab fees associated with four convictions, the sentences for which the court stayed. We agree and will instruct the trial court to correct the abstract of judgment as discussed below.

FACTUAL BACKGROUND

A. *2012 Convictions and Sentencing*

At a jury trial in 2012, the People presented evidence that Gaona was a "courier of narcotics and narcotics proceeds" in what expert testimony described as "a systematic and ongoing criminal business operation" to "import, store, and distribute cocaine [and] then return the proceeds to Mexico." Wiretapped telephone conversations presented at trial reflected that Gaona was instructed when and where to make deliveries and pickups. To execute these instructions, Gaona coordinated by phone with other couriers, and transported cocaine and cash to and from "stash houses" using a secret compartment in his car. Surveillance efforts based on locations identified in Gaona's wiretapped conversations led to seizures of drugs at four locations, one of which housed 173 kilograms of cocaine. Although guns were recovered from these locations, they did not belong to Gaona, nor did any evidence suggest Gaona armed himself while acting as a courier.

Appellant was convicted of four counts of conspiracy to transport cocaine (Pen. Code, § 182, subd. (a)(1)),[2] four counts of transporting cocaine (Health & Saf. Code, § 11352, subd. (a)),

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[2] Unless otherwise indicated, all statutory references are to the Penal Code.

and four counts of possessing cocaine for sale (Health & Saf. Code, § 11351). The jury also found true 12 weight-based sentencing enhancements, one for each count, as follows: three counts involved more than 80 kilograms of cocaine, three counts involved more than 20 kilograms, three counts involved more than 10 kilograms, and three counts involved more than 4 kilograms.

In April 2012, the court sentenced Gaona to 42 years in county jail, a sentence comprised of seven years for the offenses and 35 years for the weight enhancements. The sentences for four of the counts were stayed pursuant to section 654. The court also imposed certain fees and assessments.

The court advised Gaona that he could be released on parole although, because the Act required Gaona's sentence be served in jail, he would not be eligible for parole.

B. *2014 Appeal (No. B240908)*

Gaona appealed that judgment, and in 2014, we reversed four of Gaona's convictions for conspiring to transport cocaine, based on instructional error. Specifically, we concluded the court had erred by not instructing the jury that it could find one overall conspiracy to commit multiple crimes as an alternative to finding the four separate conspiracies charged. We remanded for a new trial on the conspiracy counts.

C. *2018 Remand and Resentencing*

After some procedural confusion, a remittitur issued, and the parties appeared before the trial court on March 8, 2018, at which time the court dismissed the four conspiracy counts based on the People's "announcing [they were] unable to proceed on those counts." Because the People had agreed to dismiss the four conspiracy counts only "contingent on the sentence being the same . . . [¶] . . . [¶] numerically," the court resentenced Gaona on

the convictions unaffected by the appeal, effectively lifting the section 654 stays on certain counts that, absent the conspiracy counts, were no longer applicable. The trial court denied defense counsel's request that the court strike the enhancements and/or impose concurrent sentences, and the transcript suggests the court did so based in part on the arrangement with the People that the sentence length remain unchanged. Specifically, before imposing a 42-year sentence for the remaining convictions, the court noted that "part and parcel" of the prosecution's withdrawing the conspiracy counts was that Gaona again be sentenced to 42 years, as well as that "this was a pretty elaborate scheme for the distribution of contraband" involving "multiple residences and a good deal of activity indicating concealment and general illegality." The court described the sentence as "42 years in [a] state prison," although, as required by law and reflected in the court's minute order, the sentence must be served in county jail. (See § 1170, subd. (h)(5)(A).)

D. *Current Appeal*

Gaona filed a timely notice of appeal from the court's 2018 sentencing order and amended judgment. Soon thereafter, he also filed motions with the trial court requesting that (1) the court strike lab analysis fees imposed on the counts stayed pursuant to section 654, and (2) the court correct purported errors in the calculation of presentence credits reflected in the abstract of judgment.

DISCUSSION

Gaona raises several arguments challenging his sentence. We generally review sentencing decisions for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A court abuses its discretion when it fails to exercise it in a reasonable way or acts contrary to law. (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 738.)

A. *Court's Discretion Regarding Mandatory Supervision in Lieu of Jail Time*

Gaona first argues the court abused its discretion by failing to appreciate and properly execute its sentencing duties and discretion under the Realignment Act.

1. The Realignment Act

Under the Act, defendants who are convicted of certain non-serious and nonviolent felonies must serve their incarceration in county jail, rather than state prison. (Stats. 2011, ch. 15, § 1; Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1; *People v. Scott* (2014) 58 Cal.4th 1415, 1418.) Gaona's Health and Safety Code convictions are, by their own terms, punishable under the Act. (See Health & Saf. Code, §§ 11351.5 & 11352.) Accordingly, Gaona must serve and is serving his sentence in county jail. (See § 1170, subd. (h)(5)(A).)

In January 2015—after Gaona was originally sentenced, but before his resentencing on remand—amendments to the Act went into effect regarding "split sentence[s]"—that is, sentences, a portion of which is served in county jail, and a portion of which involves a period of mandatory supervision. (See *People v. Catalan* (2014) 228 Cal.App.4th 173, 178.) Specifically, the 2015 amendment created a statutory presumption that some portion of a sentence imposed under the Act will be replaced with mandatory

supervision, "[u]nless the court finds that, in the interests of justice, it is not appropriate in a particular case." (§ 1170, subd. (h)(5)(A); rule 4.415(a).) This amendment thus "eliminate[d] the straight commitment to county jail . . . as a discrete sentencing choice [under the Act] and *require[d]* that a split sentence be imposed," absent an express finding as to why it should not be. (Couzens & Bigelow, Felony Sentencing After Realignment (rev. ed. 2014) p. 23; <http://awww.courts.ca.gov/partners/documents/felony_sentencing.pdf> [as of Jan. 12, 2015] (Couzens & Bigelow), italics added; see rule 4.415(a).)[3] Because the Act as amended in 2015 "establishes a statutory presumption in favor of" split sentences, "denials of a period of mandatory supervision should be limited." (Rule 4.415(a).)[4]

Consistent with this policy, when a court declines to impose a split sentence, the court must expressly find that a split sentence would not be in the interest of justice (see rule 4.415(a)), and "state the reasons for the denial [of mandatory supervision] on the record."

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[3] "California courts have frequently cited this memorandum, noting that it reflects the views of 'two preeminent sentencing authorities.' " (*People v. Camp* (2015) 233 Cal.App.4th 461, 475, fn. 14, quoting *People v. Hul* (2013) 213 Cal.App.4th 182, 187.)

[4] Rule 4.415(a) provides: "[W]hen imposing a term of imprisonment in county jail under section 1170[, subdivision](h), the court must suspend execution of a concluding portion of the term to be served as a period of mandatory supervision unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Because section 1170[, subdivision](h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, denials of a period of mandatory supervision should be limited." (Rule 4.415(a).)

(Rule 4.415(d); see rule 4.406(b)(9).)

2. The Record Suggests the Court Was Unaware of the Act and Thus Failed to Exercise Its Discretion in Sentencing Gaona

Gaona argues the trial court was not aware of the scope and nature of its discretion under the Act, and thus could not have properly exercised that discretion in imposing his straight jail term sentence.

As a threshold matter, we note that Gaona failed to raise any argument regarding the Realignment Act below, and has thus forfeited such an argument on appeal.[5] (See *People v. Scott* (1994) 9 Cal.4th 331, 356.) We nevertheless elect to address his argument regarding the Act, as it involves a matter of "fundamental procedural rights." (*People v. Downey* (2000) 82 Cal.App.4th 899, 912 (*Downey*) ["[f]ailure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal," even if the issue was not raised below]; see also *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182 [applying *Downey* to excuse forfeiture of challenge to sentence imposed based on court's erroneous understanding of its discretion].)

The court issued a 42-year straight jail sentence under the Act, without expressly finding that a split sentence would not be in the interest of justice, or offering reasons to support its deviation from the Act's policy in favor of sentences involving mandatory

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[5] Because we reach the merits of his claim, we need not address Gaona's additional claim that his attorney provided ineffective assistance of counsel by failing to address or object based on the Realignment Act issues Gaona raises.

supervision. This failure to comply with rule 4.415, when combined with the court's references to Gaona being committed to state prison and eligible for parole—neither of which is possible under the Act—reflects that, in sentencing Gaona, the trial court apparently was unaware of the Act, including the statutory presumption in favor of mandatory supervision and the scope of a court's discretion to impose a sentence *without* mandatory supervision. "A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.; see *People v. Penoli* (1996) 46 Cal.App.4th 298, 302 (*Penoli*).)

The Attorney General counters that the trial court's reference to the nature of the offense and the prosecution's agreement to drop the conspiracy charges if the sentence remained the same provides adequate reasoning to support—and suggests an implicit finding that—a split sentence would not be in the interests of justice. Thus, the Attorney General argues, the trial court was aware of and properly exercised its discretion under the Act. We disagree.

First, the California Rules of Court expressly state that even if the parties agree to a straight jail sentence, this does not relieve the court of its duty to make findings and offer reasoning. (See rule 4.415(d).)

Second, although the nature of the offense may be a factor in determining whether a split sentence would be in the interests of justice (see rule 4.415(a)(4)), and although the court is free to "give a single statement explaining the reason or reasons for imposing a particular sentence or the exercise of judicial discretion," the court must nevertheless "identif[y] the sentencing choices where discretion is exercised." (Rule 4.406(a); see rule 4.406(b)(9)

["Sentence choices that generally require a statement of a reason include, but are not limited to [¶] . . . [¶] . . . [d]enying mandatory supervision in the interests of justice under section 1170[, subdivision](h)(5)(A)."].) Here, the court did not do so, nor does the context in which the court referenced the nature of the offense—that is, in response to counsel's argument against consecutive sentencing—suggest the court was offering this reason to explain a decision regarding mandatory supervision.

We need not and do not determine whether the court's failure to offer express findings and reasoning supporting a decision to impose a straight jail sentence constitutes reversible error per se. Rather, such failure, when combined with the court's apparent misunderstanding that Gaona would serve his sentence in state prison and be eligible for parole, supports Gaona's contention that the court's imposition of a straight jail sentence was "based on an erroneous understanding of the law" regarding mandatory supervision under the Act, and therefore, "the matter must be remanded for an informed determination." (*Downey*, *supra*, 82 Cal.App.4th at p. 912; see *In re Sean W., supra*, 127 Cal.App.4th at pp. 1181–1182 [sentence reflected an abuse of discretion where the record supported appellant's claim that the court incorrectly believed it did not have discretion to impose a particular sentence]; see also *Penoli, supra*, 46 Cal.App.4th at p. 302.)

B. *Supplemental Probation Report*

California law requires that "the court must refer the case to the probation officer for [¶] . . . [¶] . . . [a] supplemental report if a significant period of time has passed since the original report was prepared." (Rule 4.411(a)(2).) As of the date of this opinion, over seven years have passed since the preparation of Gaona's original report in connection with his March 2012 sentencing hearing.

Therefore, when the court resentences Gaona upon remand from the instant appeal, a "significant period of time" will have passed since the presentence investigation and original report, triggering the court's obligation under rule 4.411. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180-181 [eight-month period of time between the original report and resentencing constituted a "significant period of time" within the meaning of rule 4.411]; see Advisory Com. com, rule 4.411 ["If a full report was prepared in another case in the same or another jurisdiction within the preceding six months, during which time the defendant was in custody, and that report is available to the Department of Corrections and Rehabilitation, it is unlikely that a new investigation is needed."].) We further note that such a supplemental report could contain information relevant to assessing whether the interests of justice demand the court to implement a straight jail sentence, as opposed to a split sentence, because it could speak to services previously offered to Gaona while incarcerated and whether he took advantage of them. (See rule 4.415(b)(4); Bigelow & Prickett, Sentencing Cal. Crimes (The Rutter Group 2018) § 11:9.) Therefore, upon remand, the trial court shall order a supplemental presentence investigation report and consider such report in sentencing Gaona.

Because we will instruct the court to prepare a supplemental report on this basis, we need not address Gaona's argument that the court violated his Fourteenth Amendment rights by failing to order such a supplemental report in connection with his sentencing in 2018.

C. *Cruel and Unusual Punishment*

Gaona contends his 42-year sentence constitutes cruel and unusual punishment under both the United States and California Constitutions, because it is grossly disproportionate to his crimes. He describes himself as a "cog in the wheel" who played a limited, non-violent role in the extensive criminal enterprise the court referenced at sentencing. Gaona also argues that the weight-based sentencing enhancements that make up the bulk of his sentence, to the extent that they apply regardless of the "gradations in culpability" in the underlying offense, are arbitrary and facially unconstitutional.

As discussed above, based on Gaona's Realignment Act argument, we reverse the sentence that is the object of Gaona's cruel and unusual punishment argument. This constitutional argument is therefore moot, and we need not address it. (See *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958, quoting *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863 ["It is settled that an appellate court is to decide actual controversies by a judgment which can be carried into effect" and "cannot render opinions ' "upon moot questions or abstract propositions." ' "].)

D. *Presentence Credits*

At the March 27, 2018 hearing, the trial court awarded Gaona 914 days of presentence custody credit, comprised of 457 actual day credits (from the arrest on January 27, 2011 until the original date of sentencing on April 27, 2012) and 457 good time/work time credits, "plus 2,142 days since the original imposition of [the] sentence." The abstract of judgment reflects 1,686 days in the "actual" credits column, 456 days in the "local conduct" credits column, and 2,142 in the "total credits" column,

with a note that "the sheriff [is] to determine good time/work [credit] from the date of 4/27/12 [the date of his original sentencing]." (Boldface and/or capitalization omitted.)

Gaona argues that the abstract does not accurately reflect the presentence credits the court described at the March 2018 hearing. The Attorney General argues the trial court's verbal pronouncement incorrectly awarded Gaona 457 of days of presentence conduct credit, rather than 456 days. As we explain below, both parties are correct.

As "a prisoner . . . confined in or committed to a county jail," Gaona is entitled to presentence custody credit "from the date of arrest to the date when the sentence commences, under a judgment of imprisonment." (§ 4019, subds. (a)(1) & (f).) Under the version of section 4019 applicable to Gaona's sentencing, he is also eligible for presentence conduct credit "under [a] two days for every two days rate of accrual." (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 588; Bigelow & Prickett, Sentencing Cal. Crimes, *supra*, § 15:6 [credit calculated under the two-for-two formula for crimes committed before September 28, 2010, but only as to time served in county jail after January 25, 2010, whether or not the defendant is sent to prison or jail].) Because "no rounding up is permitted" in this calculation, the Attorney General is correct that the court should have awarded Gaona 456 days of presentence conduct credit, rather than 457 days. (*Chilelli*, *supra*, 225 Cal.App.4th at p. 588.)

At the March 2018 hearing, in addition to credit for 457 days of actual time spent in confinement from his arrest until his initial sentencing and the corresponding local conduct credit, the court correctly awarded Gaona 2,146 days credit for the actual time

served between his initial sentencing and resentencing.[6] Neither party challenges this.

Section 14 of the abstract of judgment should therefore be corrected to reflect: 456 days of "local conduct" credit, 2,603 days of "actual" presentence credit for time spent in confinement (457 day from arrest to initial sentencing, plus 2,146 days from original sentencing to resentencing), yielding a total of 3,059 credits.

E. Lab Fees

The court imposed a $50 laboratory analysis fee on all eight counts for which the Gaona was sentenced. (See Health & Saf. Code, § 11372.5). Gaona argues, and the Attorney General agrees, that the court incorrectly ordered Gaona to pay laboratory fees on counts stayed pursuant to section 654. Because the Legislature intended criminal laboratory analysis fees to constitute punishment (see *People v. Ruiz* (2018) 4 Cal.5th 1100, 1109-1111), fees associated with the counts, the sentence for which was stayed, were erroneous.

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[6] Conduct or work credits for this time period from initial sentencing to resentencing, if any, are to be determined by the Los Angeles County Sheriff, not the trial judge, pursuant to the post-conviction sentencing credit scheme. Neither party disputes this, and it is correctly noted in the abstract of judgment.

DISPOSITION

We reverse. Upon remand, the trial court shall exercise its discretion to determine whether a sentence involving some period of mandatory supervision would be in the interest of justice. The court is further instructed to order a supplemental probation report to inform its exercise of this discretion. Should the court impose a sentence that does not involve some period of mandatory supervision, the court is further instructed to make the express findings required by the Act and implementing rules.

Finally, the trial court shall amend the abstract of judgment to remove criminal laboratory fees associated with counts 3, 6, 9 and 12, and to reflect the following credits: 456 days of "local conduct" credit, 2,603 days of "actual" presentence credit for time spent in confinement (457 day from arrest to initial sentencing, plus 2,146 days from original sentencing to resentencing), yielding a total of 3,059 credits.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J. LEIS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.